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EXAMINER
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SQUIRES, ELIZA A

ART UNIT	PAPER NUMBER
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3626

NOTIFICATION DATE	DELIVERY MODE
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06/10/2009

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

ipdocket@mayerbrown.com

<b>Office Action Summary</b>	<b>Application No.</b> 10/821,084	<b>Applicant(s)</b> HODGDON, DARREN W.	
	<b>Examiner</b> Eliza Squires	<b>Art Unit</b> 3626	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 25 March 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-4 and 6-52 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4 and 6-52 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

The amendment dated 3/25/2009 has been entered. Claims 1, 2, 7 (not labeled), 8, 9, 16, 18-23, 29, 35, 39, 40, 42, 43, 46, and 51 have been amended. Claim 5 has been canceled. Claims 1-4 and 6-53 are currently pending in the application.

### ***Response to Arguments***

1. Applicant's arguments filed 3/25/2009 have been fully considered but they are not persuasive.

1. The objections to the claims have been withdrawn in light of Applicant's amendment to the claim.

2. The double-patenting rejection is withdrawn for claims 1-51 in light of cancellation of claims 1-50 and 55 of the copending application 11/055, 496. Claim 52 remains provisionally rejected, and will be withdrawn when a compliant terminal disclaimer is submitted.

3. As to Applicant's arguments regarding the rejections under 35 USC 101, Applicant argues that the claims meet the transformation test of *In re Abele* 684 F.2d 902 (CCPA 1982) as cited favorably in *In re Bilski* 545 F.3d 943 (Fed. Cir. 2008). Specifically that processing "health risks, the biometric measurement analysis, or the one or more biometric parameters" to create a Health Score provides this transformation. *Bilski* discusses in regard to *Abele* that the "data clearly represented physical and tangible objects, namely the structure of bones, organs, and other body tissues. Thus, the transformation of that raw data into a particular visual depiction of a physical object on a display was sufficient to render that more narrowly-claimed process patent-eligible". (*Bilski* p. 26) This is not the case with the instant application. The data, a Health Score, does not represent a physical and tangible object but merely an abstract value. While the system of *Abele*

Art Unit: 3626

transformed a physical structure into data representative of the structure, the claimed invention converts data into another form of data.

4. As to the rejections under 35 USC 112 second, the rejections have been withdrawn in light of the amendments to the claims.

5. As to the rejections under 35 USC 102 and 103, Applicant argues that the art does not show an “incentive program provides for an incentive for at least one of achieving a predetermined Health Score or improving a Health Score”. *Wallenfang* teaches “If they participate, if they show up, we provide a discount of \$208 a year on premiums. If they score favorably that goes up to \$338” This teaches an incentive (an extra discount on premium) for achieving a predetermined health score (scoring favorable wellness score).

6. The reference therefore teaches the limitation.

7. Applicant also addresses claim 40 which Applicant claims now affirmatively requires that “the step of completing the health risk assessment questionnaire or the biometric measurement analysis or providing the biosample for biometric analysis” be used for “categorizing the participant under assessment for purposes of enrollment in a clinical trial, on the basis of the health risk results, the biometric parameters results, or biomedical results” and states that as now claimed that the limitation is not found in the cited art. Examiner notes that *Wallenfang* teaches that “the University of Michigan tested more than 2 million people over 20 years and compared known risk factors to actual claims” and “a person who has a wellness score (at the bottom of the scale) can anticipate their annual medical costs of \$2,970 per year...conversely, a wellness score of 95 means the person would cost an average of \$1,415...” *Wallenfang* uses the results of the health score to categorize the population to at least the bottom

Art Unit: 3626

of the scale and a score of 95 in order to conduct a clinical trial, or analyze claim costs of the categorized populations.

8. The reference therefore teaches the limitation.
9. The rejections are maintained.

Art Unit: 3626

***Claim Rejections - 35 USC § 101***

11. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

**Claims 1-50** are rejected under 35 U.S.C. 101. Based on Supreme Court precedent and recent Federal Circuit decisions, the Office's guidance to examiners is that a § 101 process must (1) be tied to a machine or (2) transform underlying subject matter (such as an article or materials) to a different state or thing. In re Bilski et al, 88 USPQ 2d 1385 CAFC (2008); Diamond v. Diehr, 450 U.S. 175, 184 (1981); Parker v. Flook, 437 U.S. 584, 588 n.9 (1978); Gottschalk v. Benson, 409 U.S. 63, 70 (1972); Cochrane v. Deener, 94 U.S. 780,787-88 (1876).

An example of a method claim that would not qualify as a statutory process would be a claim that recited purely mental steps. Thus, to qualify as a § 101 statutory process, the claim should positively recite the particular machine to which it is tied, for example by identifying the apparatus that accomplishes the method steps, or positively recite the subject matter that is being transformed, for example by identifying the material that is being changed to a different state.

Here, applicant's method steps fail the first prong of the new Federal Circuit decision since they are not tied to a machine and can be performed without the use of a particular machine.

***Claim Rejections - 35 USC § 102***

12. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

13. **Claims 1, 6, 8, 10-11, 14-15, 22-24, 28-31, 39-41, 44-50** are rejected under 35

U.S.C. 102(b) as being anticipated by “Wisconsin Businesses, Insurers Take New Look at Wellness Programs” by *Wallenfang*.

14. **As to claim 1**, *Wallenfang* discloses A method of administering an incentive based health care program, the method comprises:

offering one or more incentives to one or more participants of the health care program (page 2 wherein an incentive is a discount on premium or "a trip to Las Vegas"), the one or more incentives provided to the one or more participants to perform at least one of completing a health risk assessment questionnaire addressing one or more health risks (page 2), completing a biometric measurement analysis addressing one or more biometric parameters (page 2 wherein a biometric measurement is a blood pressure, height or weight), or providing a biosample for biomedical analysis (page 2 wherein a biosample is used to check cholesterol and blood sugar); wherein, if the one or more participants completes the health risk assessment questionnaire, completes the biometric measurement analysis, or provides the biosample, the incentive is awarded to the one or more participants (page 2 wherein a patient who participates is provided a premium discount); and if the biosample is provided the biosample is analyzed for one or more biomedical parameters (page 2 wherein a biosample is checked for cholesterol or blood sugar);

Art Unit: 3626

scoring, ranking, or grading at least one of the one or more health risks, the biometric measurement analysis, or the one or more biometric parameters to calculate a Health Score (page 2 wherein a wellness score is assigned); and

notifying the one or more participants of the Health Score (page 3 wherein "individual reports are mailed to employees' homes").

Calculating incentive information in accordance with an incentive program, wherein the incentive program provides for an incentive for at least one of achieving a predetermined Health Score (page 2 wherein "if they score favorably that [discount on premiums] goes up to \$338).

15. **As to claim 6**, see the discussion of claim 1 and 5, additionally, *Wallenfang* discloses the method wherein the incentive program bases the incentive information on the Health Score of the participant (page 2).

16. **As to claim 8**, see the discussion of claims 1 and 5, additionally, *Wallenfang* discloses the method wherein the incentive program provides for an incentive for at least one of achieving an individual parameter of a Health Score (page 2 wherein an individual parameter is a non-smoker who receives an incentive of \$250).

17. **As to claim 10**, see the discussion of claim 1, additionally, *Wallenfang* discloses the method wherein the incentive comprises a travel award or a contribution discount (page 2).

18. **With respect to claim 11**, see the discussion of claim 1, additionally, *Wallenfang* discloses the method wherein the incentive comprises a financial reward (page 2).

19. **As to claim 14**, see the discussion of claim 1, additionally, *Wallenfang* discloses the method wherein the one of the one or more health risks, the biometric parameters, or the biomedical parameters are scored based on an impact on excess health care claims (page 3).



Art Unit: 3626

20. **As to claim 15**, see the discussion of claim 1 and 14, additionally, *Wallenfang* discloses The method of claim 14, wherein the one of the one or more health risks, the one or more biometric parameters, or the one or more biomedical parameters comprises at least one of tobacco use, blood pressure, body weight, cholesterol level, or glucose level (page 2).

21. **As to claim 22**, see the discussion of claim 1, additionally, *Wallenfang* discloses that the one or more biomedical parameter assess vital organ function (*Wallenfang* wherein deviations from normal in blood sugar is well known in the art to be possibly caused by pancreatic malfunctions, therefore a measurement of blood sugar assess pancreatic function)

22. **With respect to claim 23**, see the discussion of claim 1, additionally *Wallenfang* discloses the method including measuring total cholesterol (*Wallenfang* page 2)

23. **As to claim 28**, see the discussion of claim 1, additionally, *Wallenfang* discloses the method further comprising offering to the one or more participants after completing the health risk assessment questionnaire or the biometric measurement analysis, or providing the biosample, information preventive care (page 3).

24. **With respect to claim 29**, see the discussion of claim 1, *Wallenfang* discloses that at least one of the one or more biometric or biomedical parameters are reported to one or more participants (*Wallenfang* page 2 where "individual reports are mailed to employees" and "A lot [of participants] said, 'Wow, I have high cholesterol'").

25. **As to claim 31**, see the discussion of claim 1, additionally, *Wallenfang* discloses that the method wherein the at least one of the one or more health risks, the one or more biometric parameters, or the one or more biomedical parameters are reported to the one or more

Art Unit: 3626

participants in one or more forms comprising numerically, graphically, verbally, telephonically, electronically, or textually (page 3).

26. **With respect to claim 39**, see the discussion of claim 1, additionally, *Wallenfäng* discloses the method wherein the one or more incentives are provided to the one or more participants to perform the health risk assessment questionnaire and wherein the health risk assessment questionnaire assesses at least one of tobacco use (smoking *Wallenfäng* page 2)

27. **As to claim 40**, see the discussion of claim 1, additionally, *Wallenfäng* teaches that "the University of Michigan tested more than 2 million people over 20 years and compared known risk factors to actual claims" and "a person who has a wellness score (at the bottom of the scale) can anticipate their annual medical costs of \$2,970 per year...conversely, a wellness score of 95 means the person would cost an average of \$1,415..." *Wallenfäng* uses the results of the health score to categorize the population to at least the bottom of the scale and a score of 95 in order to conduct a clinical trial, or analyze claim costs of the categorized populations.

28. **As to claim 41**, see the discussion of claim 1. This claim refers to an intended purpose or use for a method step recited in claim 1. This purpose for which the method step of claim 1 is used, in itself is not a method step and is not an action that can be performed. This claim, therefore, is indistinguishable from that which was claimed in claim 1.

29. **With respect to claim 44**, see the discussion of claim 1, additionally *Wallenfäng* discloses the method wherein the participant consents to allowing a subcontractor, to use information collected in conjunction with the health care program to generate at least a group report (page 2 and 3 wherein consent is given by the program being voluntary and the participant agreeing to be assessed with the knowledge of the components of the program).

Art Unit: 3626

30. **As to claim 45**, see the discussion of claim 1 and 44, additionally *Wallenfang* discloses the method wherein the at least one reports or comparisons comprise aggregate information (page 3).

31. **As to claim 46**, see the discussion of claim 1, 44, and 45, additionally, *Wallenfang* discloses the method wherein the aggregate information does not contain data that identifies an individual participant (page 3).

32. **As to claim 47**, see the discussion of claim 1, additionally, *Wallenfang* discloses The method of claim 1, wherein the information collected from the one or more participants in conjunction with the health care program is communicated to at least one of a coach or a health care practitioner to at least one of assist in instructing the participant in regard to the information (page 2 and 3).

33. **As to claim 48**, see the discussion of claim 1 and 47, additionally, *Wallenfang* discloses the method wherein the information communicated to the at least one coach or health care practitioner is done with consent of the participant (page 2 and 3 wherein consent is given by the program being voluntary and the participant agreeing to be assessed with the knowledge of the components of the program).

34. **As to claim 49**, see the discussion of claim 1 and 47, additionally, *Wallenfang* discloses the method wherein the health care practitioner comprises a nurse (page 2 and 3).

35. **With respect to claim 50**, see the discussion of claim 1, additionally, *Wallenfang* discloses the method wherein the one or more incentives are provided to the one or more participants to provide a biosample for biomedical analysis the biosample comprises a blood or tissue sample (*Wallenfang* page 2 see blood sugar and cholesterol check).

***Claim Rejections - 35 USC § 103***

36. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

37. **Claims 2-4, 7, 12-13, 32-34, and 36-37** are rejected under 35 U.S.C. 103(a) as being unpatentable over *Wallenfang* in view of "Business and Health; the 'Wellness' Discount Plans" by *Kramon*.

38. **As to claim 2**, while *Wallenfang* discloses the method of claim 1 substantially as claimed, the reference does not explicitly teach that the contribution discount is given in the form of a percentage. In the same field of endeavor, *Kramon* discloses the method wherein the incentive comprises a contribution discount of 0.1% to 99% (Page 2).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify *Wallenfang* with *Kramon* since discounts using percentages are well known in the art as demonstrated by the *Kramon* reference as they allow a program to become scalable to the various contribution rates of various individuals and organizations.

39. **As to claim 3**, see the discussion of claims 1 and 2, additionally, *Kramon* discloses the method wherein the contribution discount is 20% or less.

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify *Wallenfang* with *Kramon* since discounts using percentages are well known in the art

Art Unit: 3626

as demonstrated by the *Kramon* reference as they allow a program to become scalable to the various contribution rates of various individuals and organizations.

40. **As to claim 4**, while *Wallenfang* discloses the method of claim 1 substantially as claimed, the reference does not explicitly teach comparing medical indices to a biomedical parameter. In the same field of endeavor, *Kramon* discloses the method wherein the incentive is based on a comparison to a medical index of normal range for the one or more biometric parameters (page 2).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the testing and incentive program of *Wallenfang* with the comparison to medical indices of *Kramon* since the use of this comparison would improve the ability of the program to generate a health score based on risks due to the deviation from normal values.

41. **As to claim 7**, while *Wallenfang* discloses the method of claim 1 and 5 substantially as claimed, the reference does not explicitly teach comparing medical indices to a biomedical parameter. In the same field of endeavor, *Kramon* discloses the method wherein the incentive program bases the incentive information on a comparison to a medical index of normal range with the one or more biometric parameters (page 2).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the testing and incentive program of *Wallenfang* with the comparison to medical indices of *Kramon* since the use of this comparison would improve the ability of the program to generate a health score based on risks due to the deviation from normal values.

42. **With respect to claim 12**, see the discussion of claim 1, additionally *Wallenfang* discloses the method wherein a health score is based upon health risks, biometric parameters, and

Art Unit: 3626

one or more biomedical parameters (page 2). However *Wallenfang* does not explicitly disclose comparing medical indices to a biomedical parameter. *Kramon* discloses the method wherein the incentive is based on a comparison to a medical index of normal range for one or more biomedical parameters (page 2).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the testing and incentive program of *Wallenfang* with the comparison to medical indices of *Kramon* since the use of this comparison would improve the ability of the program to generate a health score based on risks due to the deviation from normal values.

43. **With respect to claim 13**, see the discussion of claim 1, additionally *Wallenfang* discloses the method wherein a health score is based upon health risks, biometric parameters, and one or more biomedical parameters (page 2). However *Wallenfang* does not explicitly disclose comparing medical indices to a biomedical parameter. *Kramon* discloses the method wherein at least one of the one or more health risks, the one or more biometric parameters, or the one or more biomedical parameters are evaluated in comparison to a medical index of normal range to determine the Health Score (page 2).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the testing and incentive program of *Wallenfang* with the comparison to medical indices of *Kramon* since the use of this comparison would improve the ability of the program to generate a health score based on risks due to the deviation from normal values.

44. **As to claim 32**, while *Wallenfang* discloses the method of claim 1 substantially as claimed, the reference does not explicitly teach comparing medical indices to a biomedical parameter. In the same field of endeavor, *Kramon* discloses the method wherein the incentive is

Art Unit: 3626

based on a comparison to a medical index of normal range for the one or more biometric parameters (page 2).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the testing and incentive program of *Wallenfang* with the comparison to medical indices of *Kramon* since the use of this comparison would improve the ability of the program to generate a index based on risks due to the deviation from normal values.

45. **As to claim 33**, see the discussion of claim 1, additionally, *Wallenfang* discloses alerting individuals to health risks associated with one or more health risks, the one or more biometric parameters, or the one or more biomedical parameters (page 2 and 3). However, *Wallenfang* does not disclose comparing these to a medical index. *Kramon* discloses the method wherein the medical risks are compared to a medical index of normal range for the one or more health risks, the one or more biometric parameters, or the one or more biomedical parameters (page 2).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the testing, incentive, and reporting program of *Wallenfang* with the comparison to medical indices of *Kramon* since the use of this comparison would improve the ability of the program to generate a recommendation based on risks due to the deviation from normal values.

46. **As to claim 34**, see the discussion of claims 1 and 33, additionally *Wallenfang* discloses the method wherein the one or more participants are informed: that it is advisable to counsel one or more physicians regarding the health risk (page 2 and 3). However *Wallenfang* does not disclose that the parameter is compared to a normal value. *Kramon* makes this disclosure (page 2).

Art Unit: 3626

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the testing, incentive, and reporting program of *Wallenfang* with the comparison to medical indices of *Kramon* since the use of this comparison would improve the ability of the program to generate a recommendation based on risks due to the deviation from normal values.

47. **As to claim 36**, see the discussion of claims 1 and 33, additionally, *Wallenfang* discloses the method further comprising offering to the one or more alerted participants to treat the health risk, the biometric parameter, or the biomedical parameter, a lifestyle regimen (behavior cessation program, page 3).

48. **With respect to claim 37**, see the discussion of claims 1 and 33, additionally, *Wallenfang* discloses the method wherein the health risk, the biometric parameter, or the biomedical parameter are explained to the one or more participants in relation to at least one of the participant's health or relevance to a health-risk behavior (page 2 and 3).



Art Unit: 3626

49. **Claims 9 and 25-27** are rejected under 35 U.S.C. 103(a) as being unpatentable over *Wallenfang* in view of “Multidimensional Evaluation of Monetary Incentive Strategies for Weight Control” from the *Psychological Record*.

50. **As to claim 9**, while *Wallenfang* discloses the method of claim 1 substantially as claimed, the reference does not explicitly teach an incentive is given for a participant to participate in the future. *Psychological Record* discloses the method wherein an additional incentive is provided to the participant after achieving one or more incentives to partake in the incentive based health care program at another time (page 3 see the discussion of Group 2 also see page 7).

Since maintenance or improvement over time is an important aspect of any program to influence lifestyle changes or their maintenance, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the health care program of *Wallenfang* with the incentives for continued participation of the *Psychological Record* since the combination would encourage maintenance activities (*Psychological Record* Page 7).

51. **With respect to claim 25**, see the discussion of claim 1, additionally *Wallenfang* discloses the method wherein a health score is based upon health risks, biometric parameters, and one or more biomedical parameters (page 2). However *Wallenfang* does not explicitly disclose improvement, maintenance, or achievement over a period of time. *Psychological Record* discloses providing one or more additional incentives to the one or more participants to achieve, maintain or improve their parameters over a period of time (page 3 see the discussion of Group 2 also see page 7).

Art Unit: 3626

Since maintenance or improvement over time is an important aspect of any program to influence lifestyle changes or their maintenance, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the health care program of *Wallenfang* with the incentives for continued participation of the *Psychological Record* since the combination would encourage maintenance activities (*Psychological Record* Page 7).

52. **As to claim 26**, see the discussion of claims 1 and 25, additionally, *Psychological Record* further discloses the period of time comprises about thirty minutes to about 5 years (page 3 see the discussion of Group 2 also see page 7).

53. **As to claim 27**, see the discussion of claims 1 and 25, additionally *Psychological Record* further discloses the method wherein the period of time comprises six days (page 3 see the discussion of Group 2). Examiner notes that while *Psychological Record* teaches a week, or seven days, applicant has not submitted evidence as to the merit of six days as opposed to the taught week therefore the difference between the claimed and the cited reference is a matter of design choice. See MPEP 2144.04. The length of time (6 days as opposed to 7 days) does not materially affect the outcome of the claimed method and is therefore the claimed is obvious in view of the reference. See MPEP 2144.05.

Art Unit: 3626

54. **Claims 16-21** are rejected under 35 U.S.C. 103(a) as being unpatentable over *Wallenfang* in view of “Smart Heart Challenge” by *Quaker*.

55. **With respect to claim 16**, while *Wallenfang* discloses the method of claim 1 substantially as claimed, the reference does not explicitly teach that the physical parameters are modifiable within a period of 12 months or less. Examiner asserts however that the fact that a human body changes as a result of medication, exercise, behavioral or dietary changes is old and well known in the art. For example, in the same field of endeavor, *Quaker* discloses the method wherein the one of the one or more health risks or the one or more biomedical parameters are modifiable by the one or more participants within a period of about twelve months or less by implementation of a dietary change (page 1).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the incentive program of *Wallenfang* with the use of a lifestyle or biologic change in an individual of *Quaker* since the combination will increase the effectiveness of an incentive program.

56. **As to claim 17**, see the discussion of claim 1 and 16, additionally *Quaker* discloses the method wherein the one or more biomedical parameters comprises a cholesterol level (page 1).

57. **As to claim 18**, see the discussion of claims 1 and 16, additionally *Quaker* discloses that the pharmacological agent comprises an over the counter drug (*Quaker* wherein Quaker oatmeal is an over the counter drug).

58. **As to claim 19**, see the discussion of claims 1 and 16, *Wallenfang* discloses the behavioral change comprises an exercise program (page 2 where “...we save another \$200,000 by promoting exercise...”

Art Unit: 3626

59. **As to claim 20**, see the discussion of claims 1 and 16, additionally, *Quaker* discloses that dietary change comprises a consuming food that is lower in cholesterol (*Quaker*).

60. **As to claim 21**, see the discussion of claims 1 and 16, additionally *Quaker* discloses that dietary change comprises a consuming food that that is higher in at least one of minerals, vitamins (*Quaker*).

Art Unit: 3626

61. **Claim 38** is rejected under 35 U.S.C. 103(a) as being unpatentable over *Wallenfang* in view of *Quaker* in further view of *Psychological Record*.

62. **With respect to claim 38**, see the discussion of claim 1, additionally *Wallenfang* discloses a health score. However *Wallenfang* does not explicitly teach providing an incentive to consume foods that are higher or lower in certain nutritional elements. In the same field of endeavor *Psychological Record* discloses offering to the one or more participants to improve their physical parameter an incentive to improve the physical parameter (page 3 see the discussion of Group 2 also see page 7).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the use of a health score of *Wallenfang* with the use of incentives of *Psychological Record* since the combination would improve the program by allowing the same program to be tailored to people with different health risks.

Examiner asserts that use of consuming foods higher or lower in salt, calories, carbohydrates, protein, fat, cholesterol, or triglycerides to modify a health related parameter is old and well known in the art. For example, *Quaker* teaches that persons should consume items that are lower or higher in at least one of fat, and cholesterol to reduce their health risks (page 1).

It would have been obvious to one of ordinary skill in the art at the time of the invention to combine *Wallenfang* and *Psychological Record* with the old and well known methods of lowering health risks of *Quaker* since the combination would encourage maintenance activities (*Psychological Record* Page 7).

Art Unit: 3626

63. **Claims 42-43** are rejected under 35 U.S.C. 103(a) as being unpatentable over *Wallenfang* in view of U.S. Patent Application 2002/0072933 to *Vonk et al.*

64. **As to claim 42**, while *Wallenfang* discloses the method of claim 1 substantially as claimed, the reference does not explicitly teach accessing the program over the internet. *Vonk* discloses the method further comprising accessing the health care program over the Internet (paragraphs [0112] and claim 1).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the health care program of *Wallenfang* with the use of the internet of *Vonk* since the combination would provide significant improvements in automation (*Vonk* paragraph [0113]).

65. **With respect to claim 43**, while *Wallenfang* discloses the method of claim 1 substantially as claimed, the reference does not explicitly teach accessing the program over the internet. *Vonk* discloses the method wherein a means for communicating is implemented via a network configured to interface over the Internet between the one or more participants and the health care program (paragraphs [0112] and claim 1).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the health care program of *Wallenfang* with the use of the internet of *Vonk* since the combination would provide significant improvements in automation (*Vonk* paragraph [0113]).

Art Unit: 3626

66. **Claims 51-52** are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent 6,454,705 to *Cosentino* in view of *Wallenfang*.

67. **As to claim 51**, *Cosentino* discloses a computer program product for use with a system for managing an incentive based health care program, comprising:

a computer usable medium having program code embodied in the medium for causing the computer program to interface over a communications medium between a sponsor of the health care program and one or more participants of the health care program, wherein the program code (claim 22): performs at least one of

recognizes analyzed or raw data from one or more biometric analyses (claims 8 and 9).

evaluates the one or more biometric parameters to calculate a Health Score to assess for presence or risk of disease (claims 8, 9, column 16, lines 34-48 and column 2, lines 20-46);

However, *Consetino* does not explicitly teach that a participant is notified of the health score. In the same field of endeavor, *Wallenfang* discloses the method further comprising notifying the one or more participants of the Health Score (page 2 and 3).

And calculating incentive information in accordance with an incentive program, wherein the incentive program provides for an incentive for at least one of achieving a predetermined Health Score or improving a Health Score (*Wallenfang* page 2)

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the computer implemented health scoring system of *Consentino* with the participant notification system of *Wallenfang* since the combination would improve the ability of the patient to manage their health conditions by providing them with relevant information.

Art Unit: 3626

68. As to **claim 52**, see the discussion of claim 50, additionally, *Cosentino* discloses that the program code accesses a database (claims 1 and 8). *Cosentino* does not explicitly disclose that an incentive is calculated. In the same field of endeavor, *Wallenfang* discloses that an incentive is calculated (page 2).

It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the use of the computer system to calculate a health score of *Cosentino* with the method of using an incentive based on a health score of *Wallenfang* since the combination would have the improved function of automatically calculating an incentive for multiple people so that the calculations can be completed quicker and with reduced error.



Art Unit: 3626

69. **Claims 24 and 30** are rejected under 35 U.S.C. 103(a) as being unpatentable over *Wallenfang* in view of OFFICIAL NOTICE

70. **With respect to claim 24**, Examiner takes OFFICIAL NOTICE that it is exceedingly well known in the art that a routine cholesterol screening includes the calculation of a total cholesterol/high density lipoprotein ratio or low density lipoprotein/high density lipoprotein ratio. It would have been obvious to one of ordinary skill in the art at the time of the invention to have included this because the LDL to HDL ratio is well known to be a better indicator for heart disease than total cholesterol (OFFICIAL NOTICE).

71. **With respect to claim 30**, see the discussion of claims 1 and 29, additionally examiner takes OFFICIAL NOTICE that a report containing a comparison to normal ranges for medical parameters are exceedingly well known in the art. One of ordinary skill in the art would have provided these references so that the participant would know what the reported results mean, i.e. to identify normal from abnormal results. The claim is alternatively rejected for the same reasons as claims 1 and 29 above, as this claim is directed towards contents of a report, which is non-functional descriptive material when not connected functionally to a method step. See MPEP 2106.01.

Art Unit: 3626

72. **Claim 35** is rejected under 35 U.S.C. 103(a) as being unpatentable over *Wallenfang* in view of *Kramon* in further view of OFFICIAL NOTICE.

73. **As to claim 35**, see the discussion of claims 1 and 34, additionally, Examiner takes OFFICIAL NOTICE that once a health risk or biological metric is discovered that deviates from normal, the health practitioner like the one consulted in *Wallenfang* (page 3), upon using the information to determine a treatable illness, would prescribe a prescription (drug or agent) as necessary for the condition. Fundamental to Western Medicine is the practice of a practitioner upon testing who found a patient to have a condition treatable by pharmaceuticals, would prescribe the proper product to the patient. Examples would be if the blood sugar as analyzed by *Wallenfang* was discovered to be outside a normal range a practitioner may prescribe insulin to the patient. Or if cholesterol was found to be high, a practitioner may prescribe statin medications or alternatively supplements such as fish oil. The claimed is therefore obvious in view of *Wallenfang* and standard medical practices.

***Conclusion***

74. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Eliza Squires whose telephone number is (571)270-7052. The examiner can normally be reached on Monday through Friday 8 am - 4 pm Eastern Standard Time.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Christopher Gilligan can be reached on 571-272-6770. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3626

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/E. S./

Examiner, Art Unit 3626

5/18/2009

/C. Luke Gilligan/

Supervisory Patent Examiner, Art Unit 3626